WESTBURY TUBULAR (M) SDN BHD

v.

AHMAD ZAKI SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CIVIL SUIT NO: S7-22-132-2000]
10 NOVEMBER 2000

CIVIL PROCEDURE: *Stay of proceedings - Arbitration clause - Whether dispute should be referred to arbitration - Arbitration Act 1952, s. 6 - Lack of diligence on part of defendants to refer dispute to arbitration before action instituted by plaintiff - Whether defendants entitled to stay in the circumstances*

ARBITRATION: *Stay of proceedings - Arbitration clause - Whether dispute should be referred to arbitration - Arbitration Act 1952, s. 6 - Lack of diligence on part of defendants to refer dispute to arbitration before action instituted by plaintiff - Whether defendants entitled to stay in the circumstances*

By a written sub-contract, the defendants were the main contractor for a proposed formula one racing circuit facility at the Kuala Lumpur International Airport in Sepang. The plaintiff was the nominated sub-contractor engaged to implement the works for the roof system of the said project. The plaintiff claimed against the defendants for the remaining contract sum allegedly owed by the defendants for work done. The defendants denied the claim which led to the plaintiff filing this civil suit against them. Relying on an arbitration clause in the sub-contract, the defendants now applied for a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 ('the Act'), failing which they be allowed to file their defence within 14 days from the date of the order.

Held:

[1] The word "may" in cl. 35 of the sub-contract suggested that it was not mandatory on the part of the plaintiff to refer the dispute to arbitration. The plaintiff, therefore, could not be faulted for not exhausting the dispute resolution process by not referring the dispute to arbitration before filing the civil suit.

[2] Since the arbitration clause under cl. 35 was not mandatory, it was therefore for the defendants who insisted for the dispute to be arbitrated, to demonstrate that they took steps to settle the dispute amicably and that when the dispute could not be settled amicably, to take further steps to have the matters referred to arbitration **before** the plaintiff filed the civil

suit. The defendants failed to do so despite the ample time they had. Since they lacked diligence in pursuing their right under the sub-contract, they were therefore not entitled to have the civil suit stayed under s. 6 of the Act.

[Application for stay dismissed; application to file defence allowed.]

Case(s) referred to:

D&C Finance Bhd v. The Overseas Assurance Corpn Ltd [1989] 2 CLJ 598 ***(refd)***

Kien Tat Sdn v. Klockner Industrie – Anlagen GmbH [1989] 1 MLJ 498 ***(refd)***

Lee Brothers Constrution Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(refd)***

Lee Kee Seng v. Mohamed Halim Ismail, Kuala Lumpur High Court Civil Suit No. 655 of 1984 ***(refd)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400 ***(refd)***

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena) [1996] 1 CLJ 231 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

For the applicants/defendants - Catherine Koo; M/s Yip & Co

For the respondent/plaintiff - Celine Chelladurai; M/s Rashid & Lee

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Introduction

By a written sub-contract, the first, second and third defendants together in a joint venture, were the main contractor for the then "proposed formula one racing circuit facility and associated works at Kuala Lumpur International Airport, Sepang, Selangor Darul Ehsan" (hereinafter referred to as "F1 project"). The plaintiff was the nominated sub-contractor engaged by the employer to implement the works for the roof system of the said F1 project. The plaintiff's claim against the defendants is for the remaining contract sum of RM3,090,204.11 alleged to be owed by the defendants. The defendants have denied all along that they are indebted to the plaintiff for the sum for the reason that the plaintiff had failed to fulfil their obligations under the sub-contract and to complete the sub-contract works. As a result of the plaintiff's breach of contract, the defendants had no choice but to engage third party to finish the works.

The plaintiff sued the defendants for the remaining contract sum. On 26 April 2000, the defendants entered a conditional appearance and took out a summons-in-chambers, and relying on an arbitration clause in the sub-contract, applied for an order of stay pursuant to s. 6 of the Arbitration Act 1952 (the Act), failing which the defendants applied that they be allowed to file their defence within 14 days from the date of the order.

After having carefully perused the record, 1, on 17 October 2000, exercised my discretion to dismiss the application for stay with costs, but allowed the defendants' application to file their defence as prayed.

I now give my reasons for so doing.

The Reasons

Clause 35 of the conditions of sub-contract, *inter alia*, provides that:

> 35.1: If any dispute or difference shall arise between the contractor and the sub-contractor either during the period of the sub-contract or after the expiry thereof or after the determination of the sub-contractor's employment under the sub-contract or breach of the sub-contract, as to:
>
> (a) the interpretation of the sub-contract; or
>
> (b) any matter or thing of whatsoever nature arising under the sub-contract; or
>
> (c) the withholding by the contractor of any payment to which the sub-contractor may claim to be entitled,
>
> then such dispute shall be settled amicably between the parties. Any such dispute or difference which cannot be settled amicably **may be referred to arbitration** and final decision of a person to be agreed between the parties to act as arbitrator, or failing agreement, of a person nominated on the application of either party by the Director for the time being of the Regional Centre for Arbitration in Kuala Lumpur.
>
> 35.2: Before commencing arbitration the party wishing to have recourse to arbitration shall serve a notice to that effect upon the other party. Such notice shall establish the entitlement of the party giving the same to commence an arbitration but no arbitration proceedings shall be commenced unless amicable settlement cannot be reached.
>
> (Emphasis added)

Section 6 of the Act reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In *D&C Finance Bhd v. Overseas Assurance Corpn Ltd* [1989] 3 MLJ 240, Zakaria Yatim J (as he then was) at p. 241 said:

> In considering whether to grant or refuse the application the court had to be satisfied with the requirements of s. 6 of the Arbitration Act, namely:
>
> (1) there was an agreement between the parties and the agreement contained an arbitration clause;
>
> (2) that the applicant had not taken any other steps in the proceedings;
>
> (3) there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreements; and
>
> (4) that the applicant was at the time when the proceedings were commenced still ready and willing to do all things necessary to the proper conduct of the arbitration.

In an application pursuant to s. 6 of the Act, the court had a discretion whether or not to grant stay. The provision of the section is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with (see *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, SC).

In *Lee Kee Seng v. Mohamed Halim Ismail*, Kuala Lumpur High Court Civil Suit No. 655 of 1984 (unreported) which was quoted in *D&C Finance, supra*, the learned judge in that case held that the defendant did not take any steps to have the matter referred to arbitration **before the action was instituted** by the plaintiff and that the defendant was not therefore entitled to have the action stayed under s. 6 of the Act.

In the present case, cl. 35 must be read in relation to s. 6 of the Act. The language used in the arbitration clause, in my view, is wide and clear. It covers "any dispute or difference" arising out of any matter whatsoever under the sub-contract between the parties. From the record, it appears that there are disputes over the plaintiff's claim under the sub-contract between the parties. However, there is a condition under cl. 35 which must be complied first before any dispute may be referred to arbitration. The condition is that it must be shown that the disputes cannot be settled amicably between the parties.

Whether Mandatory Under Cl. 35 To Refer The Disputes To Arbitration

On the facts of this case, there is no compulsion on the part of the plaintiff to refer the disputes to arbitration. Unlike in the cases of *Perbadanan Kemajuan Negeri Perak, supra*; *Kien Tat Sdn v. Klockner Industrie – Anlagen GmbH* [1989] 1 MLJ 498; *Lee Brothers Constrution Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459; *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231 FC, which used the phrase "**shall** be referred to arbitration" in their respective arbitration clause, the instant case however, uses the phrase '**may** be referred to arbitration' clause in the sub-contract. Thus, to my mind, the usage of the word **'may'** in cl. 35 suggests that it is not mandatory on the part of the plaintiff to refer the disputes to arbitration. Since it is not a mandatory provision to be bound, the plaintiff cannot therefore be faulted for not exhausting the dispute resolution process by not referring the disputes to arbitration before filing the civil suit. Therefore, the plaintiff's claim is not premature.

Whether The Defendants Were Lacking In Diligence

In the present case, the plaintiff's director, Abdul Malek bin Mahmood in his affidavit at encl. 21 stated that the defendants' claims as disputes were baseless and alleged that the defendants' application was an attempt to delay the plaintiff's claim. In this respect, I found much merit in the second part of his allegation.

Whilst it is true that under s. 6 of the Act there is no requirement that the dispute has to be *bona fide* for the court to exercise its discretion to order a stay, and any dispute or difference would suffice, as the court is not required to critically examine the merits of the claim (see *Tan Kok Cheng*, *supra*), the defendants in this case, in my judgment, were lacking in diligence in pursuing his right under the sub-contract. The defendants failed to take any initiative to settle their differences amicably and to invoke the arbitration clause. The series of correspondence between the parties have not shown any intention whatsoever on their part to arbitrate the dispute. The third defendant's executive director, on behalf of all the defendants, in his letter dated 18 August

1999 marked A-10 of encl. 29 affidavit, did not indicate at all in the letter that they would take steps to amicably settle the problems of "under payment and under certifications by yourselves (defendant)" raised by the plaintiff in its letter marked AMM-5 dated 27 July 1999 of encl. 27, and to have the matter referred to arbitration before the action was instituted by the plaintiff. In my view, since the arbitration clause under cl. 35 is not mandatory in its terms, it is therefore for the defendants who insist for the disputes to be arbitrated, besides their declaration of readiness and willingness to do all things necessary to the proper conduct of the arbitration, to at least demonstrate they have taken steps to settle the disputes amicably and when the disputes cannot be settled amicably, they must take further steps to have the matters referred to arbitration before the plaintiff files the suit. In this case, they failed to do, despite the ample time they had. During the period of seven months from 27 July 1999 to the date of filing of the suit by the plaintiff on 24 February 2000, the defendants did nothing to settle the disputes amicably and have them referred to arbitration. Since they were lacking in diligence, they were therefore not entitled to have the suit stayed under s. 6 of the Act.

For these reasons, I found there was no merit in the defendants' application and made the order accordingly.